

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1223 OF 2002

Salim Abdul Naim Sheikh
Kolhapur Central Prison
Kalamba

... Appellant

V/s.

The State of Maharashtra

... Respondent

Ms.Shobha Gopal, Advocate appointed for Appellant
Mrs.M.M. Deshmukh for Respondent-State

CORAM: S.B. MHASE &
SMT.NISHITA MHATRE, JJ.

DATED: FEBRUARY 2, 2007

ORAL JUDGMENT (PER SMT.MHATRE, J.):

. The Appeal arises from the judgment and order of the I Additional Sessions Judge, Raigad-Alibag in Sessions Case No.19 of 2002. Accused No.1 who is the present appellant has been convicted and punished for the offence under section 302 of the Indian Penal Code while accused No.2 has been acquitted of the same offence.

2. The Accused were inmates of the Beggars' Home cum Leprosy Asylum at Village Pui-Kolad, Taluka Roha. At out 9 pm on 1.9.2001, the guard employed in the Beggars' Home (for short, hereinafter referred to as 'Home') found a dead body of one Ramprajapati in the premises. He informed the Superintendent of the Home who rushed to the spot. The victim was lying in a pool of blood with an injury on his neck. Both the accused were present there with blood stains on their clothes.

The victim was declared dead by the Doctor who was called to the spot. An extra judicial confession was made according to the prosecution by accused No.1 to the Superintendent of the Home. On this basis, he was arrested alongwith accused No.2 and charged for having murdered the victim. Both the accused were tried by the Sessions Court. Accused No.1 was convicted while accused No.2 was acquitted of the offence punishable under section 302 of the Indian Penal Code.

3. The prosecution has relied on 4 witnesses to prove its case against the accused. It has mainly relied on the extra judicial confession allegedly made by accused No.1, the appellant in this case and the recovery of two pieces of rope made at his instance. PW1 who is the Superintendent of the Home has stated that one Bharat Shetty, the guard who was on duty in the Home on the fateful day, informed him at about 11 pm that Ramprajapati had been found dead, lying in a pool of blood. He claims to have asked accused No.1 who was present near the dead body as to why he had assaulted the deceased. Accused No.1 then told him that he had a quarrel with the deceased when they were both living and begging on the footpath at Chembur. The deceased had threatened him with dire consequences at that time. This witness claims that the accused No.1 then told him that he was playing cards in the Home with Accused No.2 when the deceased kicked him before going to sleep. He has stated that accused No.1 confessed to him that he

was enraged due to which he, accused No.1 and accused No.2 inflicted the injury on the throat of the victim and killed him. Accused No.2 was present while accused No.1 was narrating the incident and making a confessional statement to this witness. In the cross-examination, the witness has admitted that the barrack in which the accused were residing was a big hall which could accommodate about 50 persons. He has disclosed that Bharat Shetty, the Security Guard employed in the Home informed him of the incident. The Security Guard also told him that the accused No.2 had handed over a razor blade to him. The witness has admitted that he made no enquiry with any other person about the incident. From this deposition, it is evident that PW1 had no personal knowledge about the incident. He learnt of it only from Bharat Shetty who surprisingly has not been examined by the prosecution in this case. He claims that Bharat Shetty handed over a razor blade to him but there is no corroborative evidence to that effect.

4. PW2 is the panch witness who has proved the seizure panchanama. He has stated that Bharat Shetty produced a razor blade before the police which was blood stained. He has then deposed that on 3.9.2001, two ropes were discovered at the instance of accused No.1. These ropes were recovered from the ground outside one of the wards of the Home. He has witnessed the statement of accused No.1 which was recorded and is at

Exhibit 16.

5. In this confessional statement, accused No.1 has stated that he and the victim had quarrelled about 6 months earlier when they both resided on a footpath at Chembur. He has mentioned that on the night of 1.9.2001, at about 10.30, when he was playing cards with accused No.2, the victim kicked him. Enraged by this act of the deceased, he and accused No.2 inflicted an injury on him when he was asleep. He claims to have pressed close the mouth of the victim with his hand, while accused No.2 inflicted an injury on the victim's neck with a razor blade. Since the victim did not die with that injury but was writhing, accused No.1 has stated that he throttled the victim with ropes from his bed roll, due to which the victim died. Interestingly, the postmortem examination which was conducted on the dead body reveals that there were no ligature marks on the neck of the deceased. PW3 is the Investigating Officer who has seized the razor blade and the ropes both of which were blood stained.

6. PW4 is the Doctor who performed the postmortem examination of the victim's body opined that the death occurred due to haemorrhagic shock on account of the incised wound over the neck. The Doctor has opined that the injury could be sustained with a sharp edged weapon like a razor blade.

7. On a reappraisal of the evidence before the Sessions Court we are unable to agree with the conclusions drawn by the learned Sessions Judge. The main ground on which the learned Sessions Judge has accepted the prosecution's case is that there is an extra judicial confession allegedly made by accused No.1 to the Superintendent, PW1. However, this theory of there being an extra judicial confession appears to be doubtful.

8. It is well settled that an extra judicial confession is to be accepted with the great deal of circumspection. The circumstances in which the statement is allegedly made must be taken into consideration. Besides, the veracity of the testimony of the witness deposing about the extra judicial confession also must be borne in mind. In the present case, PW1 claims that Accused No.1 confessed to him about having committed the crime. However, in his statement to the police he has stated that he and 4 others from the Home were present when the statement was allegedly made. While in his deposition he has stated only Dr.Chaudhari was present with him at the scene of the offence when the confessional statement was allegedly made, in his complaint he speaks of the presence of the Superintendent of the Home, S.N. Naik, Senior Clerk Sonavane, Jamadar V.S. Maskar and Dr.Chaudhari with him in the Jamadar's room where the confessional statement was recorded. This is a material

omission on the part of the witness. Besides this, none of these persons have been examined by the prosecution to corroborate the deposition of PW1. In our opinion, therefore, no reliance can be placed on the so called extra judicial confession.

9. If the statement of the Accused No.1 at Exhibit 16 is to be relied on it indicates that while he clamped his hand down on the mouth of the deceased it was accused No.2 who inflicted the injury on the victim's neck. Accused No.2 has been acquitted by the Sessions Court. Therefore, we are not able to accept the reasoning of the Sessions Court for convicting the accused No.1 if his statement at Exhibit 16 is accepted. Apart from this, the cause of death of the victim is the incised injury on the neck of the victim. The statement at Exhibit 16 discloses that accused No.2 inflicted the injury but the Sessions Court has acquitted him. The Doctor has opined that the razor blade attached could have caused the injury which led to the death of the victim. However, the recovery of this razor blade is again doubtful. According to the prosecution, it is one Bharat Shetty who was the Guard at the Home who recovered it from the accused. The prosecution has not examined Bharat Shetty the guard who was on duty and who had discovered the dead body of the victim. He is a material witness who would have shed some light on the incident. The prosecution has then claimed that Bharat Shetty has produced a razor blade which was blood

stained. However, there is no evidence on record to show that the razor blade was obtained by Bharat Shetty from either accused No.1 or accused No.2. If Bharat Shetty was the guard on duty at the point of time when the incident occurred, he would possibly have some knowledge about the incident and would therefore, have been a material witness. Not having examined him would in our opinion be fatal to the case of the prosecution.

10. The prosecution has then implicated accused No.1 by pointing out that the accused was found wearing blood stained clothes. The razor blade and the ropes which were allegedly found at the instance of accused No.1 were also blood stained. The chemical analysis indicates that the razor blade, the ropes and the clothes of the victim had human blood belonging to group AB. However, an analysis of the blood stains on the clothes worn by the accused was inconclusive. There is no evidence on record to establish what was the blood group of the victim or the accused. In such circumstances, this evidence which the prosecution has sought to rely on also does not point to the guilt of the accused No.1. Furthermore, the ropes were found in an open space on the southern side of the barrack in which the accused and the victim were housed. The ropes were recovered 2 days later and therefore, the recovery itself in our opinion is doubtful.

11. When the recovery is doubtful, Bharat Shetty,

the Guard, has not been examined and there is no corroborative evidence for the extra judicial confession, we are unable to accept the findings of the Sessions Court as regards the guilt of the accused No.1. We therefore set aside the impugned judgement and order. The order of conviction and sentence is also set aside. The Appellant be released forthwith if not otherwise required in law. Appeal allowed accordingly.

(Smt.Nishita Mhatre, J.)

(S.B. Mhase, J.)